FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 300.

JERRY BRUNO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

M. MICHAEL EDELSTEIN,
Counsel for Petitioner.

SAMUEL B. WASSERMAN,
on the Brief.

INDEX.

Cases Cited.

Statutes and Authorities Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 300.

JERRY BRUNO,
Petitioner,
v.
UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

Opinion Below.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R 417-421) is reported in 105 Fed. (2d) 921.

Jurisdiction.

The Circuit Court of Appeals made its order, affirming petitioner's conviction in the District Court, on July 20, 1939 (R 422). The petition for a writ of certiorari, filed herein on August 18, 1939, invoked the jurisdiction of the Court under Title 28 U. S. Code 347 (a).

Certiorari to the Circuit Court of Appeals for the Second Circiut was granted herein on October 9, 1939.

Statement.

Petitioner and 87 others were indicted in the United States District Court for the Southern District of New York for conspiracy to violate certain United States laws

relating to the importation and payment of duties and taxes upon narcotic drugs (R 7-16). Petitioner and 14 others were tried together. Petitioner and some of the others were convicted. Petitioner was sentenced to serve a term of 2 years and to pay a fine of five thousand ($5,000.00) Dollars (R 5). Petitioner and another appealed to the Circuit Court of Appeals for the Second Circuit which affirmed petitioner's conviction in a *per curiam* opinion (R 417-421) by Circuit Judges L. Hand, A. N. Hand, and Clark.

Petitioner did not testify at the trial but some of the other defendants did. The trial court, in its charge, said (R 332):

> "It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

The defendants requested the following charge which was denied and an exception was duly taken (R 345, 407):

> "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

The evidence presented at the trial showed violations of the narcotic laws on a large scale in New York, Louisiana and Texas. The Circuit Court stated that it could be found from the evidence that a conspiracy

existed requiring the cooperation of four groups of persons; smugglers who imported the drugs, middlemen who distributed them and two groups of retailers, one in New York and the other in Louisiana and Texas (R 417). The Circuit Court conceded that no connection was shown between the smugglers and either group of retailers (R 418).

An analysis of the evidence will show that the classification adopted by the Circuit Court was greatly oversimplified. Not only were these groups involved but the evidence revealed that the smugglers consisted of two unconnected groups, that the "retailers" consisted of at least three groups and that one of them in turn sold to other retailers.

The smugglers consisted of two unconnected groups; one, the Caputo brothers and their associates, Lago and San Pedro, smuggled opium into New York by means of transatlantic liners (R 79); the other consisted of John Vencileoni, who smuggled heroin by the same means, and who was aided in removing the heroin from boats by Charles Morgan, Louis Liguorio and Louis Colonna (R 89, 90, 91, 117, 118).

The middlemen, a group consisting of Lucien Ignaro, Louis Ruppolo, Vincent Carrerria and Felix Papa, were organized in December, 1936, for the purpose of buying narcotics from the smugglers and selling it to retailers (R 71-73). The members of the Ignaro group were arrested on May 24, 1937, at which time the existence of their group was terminated (R 31, 32, 103).

Prior to the formation of the above mentioned group of middlemen in December, 1936, Ignaro had acted as a lone middleman, selling narcotics to a New York group allegedly consisting of Al Mauro, Don Alphonso (Alphonso Marzano) and Jerry Bruno, the petitioner (R 71-73). This group was formed some time in 1936 (R 48-61) and ended its existence in December, 1936 (R 61, 71-73).

The Ignaro group of middlemen, after its formation, resold the narcotics it obtained from the smugglers to various individuals and groups. One New York group was composed of Dominick Vaccaro, Little Joe and Frenchy (R 71, 72, 76, 77, 78). Other purchasers were Dominick Visco (R. 82-84), Louis King (R 82-84), and Nicholas Gentile (R 80, 81, 86, 87).

Nicholas Gentile sold narcotics in Louisiana through his agents, Anthony Lima, Frank Cicciofera, Thomas Siracuso and Jimmy Campo (R 86, 93, 155, 158, 159, 166, 167). They sold narcotics to the Bonura brothers (R 172, 173) who in turn sold to others (R 171).

Gentile also sold narcotics in Texas through Biaggio Angelica (R 185, 192) who sold through Anthony Virizi, Leo Attanasio, August Simoncini, Alphonse Attardi and Vincent Gentiluomo (R 149, 150, 183, 184, 190, 191, 210, 211) to various individuals named Joe Massa, Joe Passarello and Katherine Phillips. Massa was partners with one, Sgitcavitch (R 175) and they sold to one, McDonald (R 184, 192).

The evidence tended to establish that petitioner was a member of one of the New York group of "retailers" composed of Al Mauro, Don Alphonso (Alphonso Marzano, R 48, 317) and Willie Ross. Al Mauro pleaded guilty and testified for the government (R 48-66). Marzano stood trial, testified on his own behalf (R 317-319), and was acquitted. Don Alphonso denied the testimony given by Mauro (R 318). Mauro's testimony was vague and unconvincing in its details, and his credibility was affected not only by Don Alphonso's denial but by the picture of him as head of a group, given in Ruppolo's testimony (R 68, 69, 71, 72). Mauro testified that he knew Don Alphonso for seven or eight years; that in the winter of 1936, he, Alphonso, Bruno and Willie Ross started handling narcotics; that Alphonso bought some narcotics and that Ross and he were to sell it; that the profit was to be split between the four of them; that as they sold some of the narcotics, they received more

narcotics from Alphonso; that Don Alphonso and Jerry Bruno did not do anything with the drugs but that he and Willie Ross did everything in connection with the illicit transactions (R 48, 49, 50).

The only other evidence against petitioner involved the supposed sale of a twenty-five ounce can of cocaine to agent Esch by one, Dick La Rose alias Di Marzo (R 32, 33, 109). Di Marzo obtained $375.00 from Esch and absconded to California without delivering the cocaine. He pretended to be able to obtain the cocaine from petitioner (R 26, 27, 359). Cellentano, who was involved with Di Marzo in the above fraudulent transaction (R 109) testified that he recovered a twenty-five ounce can of cocaine from Mauro through the intervention of petitioner (R 36). Cellentano at first stated that he told Bruno to keep one-third of the drugs or the proceeds, in return for his assistance (R 36, 37) but on cross-examination he stated that Mauro had said he would give Bruno one-third (R 39). Mauro denied that petitioner had had any interest in the cocaine (R 52).

Specification of Errors.

1. The Circuit Court erred in holding that the trial court correctly refused to make the following charge (Assignment of Error No. 10, R 407):

> "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

2. The Circuit Court erred in holding that there was no variance between the conspiracy charged in the indictment and the proof offered on trial. (Assignments of Error Nos. 5, 6, 7, R 405).

Summary of the Argument.

I. Petitioner's requested charge, that the jury shall make no presumption against him because of his election not to testify, should have been granted by the trial court.

A. Such a charge is mandatory under the Fifth Amendment to the Constitution of the United States and Title 28, U. S. Code, §632.

B. The charge given by the trial court on this question prejudiced the petitioner by calling the jury's attention to the failure of the petitioner to make such election, without informing the jury of the full extent of petitioner's legal protection provided by law.

II. Variance existed between the conspiracy charged in the indictment and the crimes established by the evidence. This variance affected the substantial rights of the petitioner. Application of the rule in *Berger v. U. S.*, 295 U. S. 78, 82 (1935), required the granting of petitioner's motions to dismiss the indictment and to acquit the petitioner.

ARGUMENT.

I.

Petitioner's requested charge, that the jury shall make no presumption against him because of his election not to testify, should have been granted by the trial court.

A. *Such a charge is mandatory under the Fifth Amendment to the Constitution of the United States and 28 U. S. Code, §632.*

The petitioner did not testify at his trial. The Circuit Court conceded that the trial court's charge (p. 2, *supra*) was not the equivalent of the one requested (p. 2, *supra*), but stated that the statute's purpose was to prevent affirmative use of the accused's failure to testify as an inference of guilt; and that the instruction requested was probably futile, accused's only safety being to keep his failure as much in the background as possible (R 419, 420).

Peittioner contends that the reasoning of the Circuit Court disregards the provisions for his protection contained in the Fifth Amendment to the Constitution and 28 U. S. Code, §632. The Fifth Amendment provides:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, * * *."

Title 28 U. S. Code, §632 provides:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and court-martial, and courts of inquiry, in any State or Territory, including the Dis-

trict of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. Mar. 16, 1878, c. 37, 20 Stat. 30.)".

A summary of the historical background of the above provisions will be helpful. At common law, a defendant could not be compelled to give evidence against himself. The Fifth Amendment incorporated this rule into the Constitution so that no compulsion could be applied to make a defendant testify. *McKnight* v. *United States*, 115 Fed. 972, 981, 982 (C. C. A. 6, 1902).

At common law, likewise, a defendant was not permitted to testify in his own behalf. The possible injustice worked by this rule was remedied by the statutory provision quoted above. *Wilson* v. *United States*, 149 U. S. 60, 65, 66 (1892).

Recognizing that not all defendants might desire to exercise the privilege of testifying, the statute specifically provided that no presumption might be made from such non-exercise. Even if the statute had not contained such a provision, the supremacy of the constitutional provision would have caused it to be implied, to protect silent defendants from any hostile comment.

The importance of the requested instruction to a defendant is revealed by the Circuit Court in its opinion.

> "When an accused does not take the stand, everybody knows that he fears to do so, for a man will not forego anything that may exculpate him. Sometimes, no doubt, he may merely be afraid that he cannot get out the truth on the stand, but that is very seldom. Ordinarily it is because he fears the disclosure which will result. Everybody knows this, and nobody can fail to make the inference, if he thinks about it at all; the accused's only safety is in having his failure kept as much as possible in the background (R. 420)."

If everybody believes that a person failing to take the stand is actuated by fear, then the privilege of testifying creates a presumption which extinguishes the constitutional protection of the Fifth Amendment. Section 632 has been in existence so long that jurors today know that a defendant may testify, but do not know the constitutional protection provided by the rule against self-incrimination. Obviously the only way to make the defendant's rights known to the jury is by a clear, correct statement of the applicable law. If the eyes of the jury see the taint of guilt on every defendant who remains silent, then the necessity of a charge such as that requested, is conclusively established.

The reasoning of the Circuit Court is similar to arguments made before the rule against self-incrimination became established. The rule first became firmly established in England about 1641. 4 *Wigmore on Evidence*, pp. 814, 815. In 1590 we find the precursor of the Circuit Court's argument in the trial of a defendant for seditious libel. A summary of the case is given in 4 *Wigmore on Evidence*, p. 811:

> "1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1275, 1289: Udall pleaded not guilty; and after argument made and witnesses testifying, Judge CLARK: 'What Say You? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it not?' declaring this to be a favor; Udall refused, and the judge finally asked: 'Will you but say upon your honesty that you made it not?' Udall again refused; Judge CLARKE: 'You of the jury consider this. This argueth that, if he were not guilty, he would clear himself'; then to Udall: 'Do not stand in it; but confess it.'"

The Circuit Court probably would not permit a comment of that nature by a trial court, but it held the requested charge unnecessary while admitting the existence of the prejudice which such a comment would engender.

To carry the rule against self-incrimination to its logical conclusion in justice to a defendant, the trial court not only must state that the defendant cannot be compelled to take the stand but that no presumption can be drawn against him because of his silence.

The direction, in the statute (Section 632), that no presumption shall be made because of a defendant's failure to become a witness is not merely a protection against comment upon the matter. It is an existing law to be applied to the facts. A defendant is entitled to have the jury instructed in the law pertaining to the facts before it. The failure of a defendant to take the stand is a fact, as readily apparent to the jury as it is to the court and counsel. This prejudicial fact can only be removed by a clear, impressive instruction of the law.

Petitioner's contention that the charge requested is mandatory is supported by decisions of the Seventh and Eighth Circuits. In *Stout* v. *United States*, 227 Fed. 799 (C. C. A. 8, 1915), the court, interpreting Section 632, *supra*, said, p. 803:

> "This statute restrains both court and counsel from comment upon the failure of the accused to testify. *Wilson* v. *United States*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. If he asks it, he is entitled to an affirmative instruction upon the subject, even in the absence of wrongful comment."

In that case the requested statement of the defendant's immunity was broader than the statute provided and was contained in an instruction dealing with matters upon which the trial court had charged. The refusal to give the instruction was held not to be error because of the nature of the statement and because of failure to direct the court's attention to the specific matter not covered by the Court.

In *Michael* v. *United States*, 7 Fed. (2d) 865 (C. C. A. 7, 1925) the trial court had given a requested charge,

similar to that requested herein by petitioner, but added that the instruction given did not alter the consideration they were to give to uncontradicted facts. The Circuit Court in discussing the question, said p. 866:

> "When an accused declines to take the witness stand, he is doubtless entitled to a statement from the court to the effect that his failure to testify shall not be construed against him. There seems to be a difference of opinion among the judges and the bar as to whether such references to the accused's failure to testify helps or injures him before the jury. Some courts have gone so far as to criticize the trial judge for giving such an instruction in the absence of a request."

B. *The charge given by the trial court relative to the defendant's election to testify, prejudiced the defendant.*

The trial court's charge stated (R 332):

> "It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

The trial court thus directly brought to the jury's attention the fact that some of the defendants did not testify. The court's comment on the effect to be given the testimony of a defendant who exercised the privilege left an unfavorable implication concerning a defendant who failed to exercise the privilege. If a defendant who testifies has an interest "which may seriously affect his credence," certainly the failure of a defendant to exercise that privilege will be regarded by the jury with severity.

In *Hersh* v. *United States*, 68 Fed. (2d) 799 (C. C. A. 9, 1934) the court charged that a defendant has the right not to testify but failed to charge, as requested, that in case of failure of a defendant to testify no unfavorable inference can be indulged in by the jury against the defendant for failure to testify. The court said, p. 807:

> "The statute expressly provides that the defendant may on his own request, but not otherwise, be a competent witness 'and his failure to make such request shall not create any presumption against him.' (28 U. S. C. A. §632) During the examination of the witness Klein the court stated 'the jury merely wants to listen to the defendants and find out their explanations of these several things—I assume.' While this statement was not objected to at the time and no exception reserved thereto, because of it defendant Hersh was entitled to have the jury instructed, as requested, that the failure of the witness to take the stand should not count against him. This error was prejudicial as to Hersh."

Here, because of the court's own charge, petitioner was placed in an unfavorable light. The prejudice to petitioner could be removed only by giving the requested charge. In view of the fact that the principal evidence against petitioner was given by Mauro, an accomplice; that Mauro accused petitioner and one, Marzano, alias Don Alphonso, of being his partners in a conspiracy to deal in narcotics; and that Marzano testified and denied Mauro's story, the extent of prejudice to the petitioner cannot be determined. It is important to note that on almost the same evidence the jury acquitted Marzano, who testified, but convicted Bruno who did not exercise the same privilege. Under the circumstances the requested charge should have been given to minimize prejudice as much as possible. *Gold* v. *United States*, 102 Fed. (2d) 350, 352 (C. C. A. 3, 1939).

The argument on this point contained in *Swenzel* v. *United States*, 22 Fed. (2d) 280 (C. C. A. 2, 1927) is

based on statements that, *in the absence of a request by defendant*, the better rule requires the court not to charge concerning a defendant's failure to testify. The argument of the *Swenzel* case overlooks the fact that the option is one which belongs to the defendant solely. The defendant is the one to determine how he will protect his interests. If he makes no request and wishes to waive the protection accorded him by the Constitution and the statute that is the defendant's right.

Where a defendant is the sole accused he may believe it more advantageous to omit any charge concerning his election to testify. That it may be less prejudicial to a defendant under one set of circumstances to omit the charge does not remove the prejudice which may exist under different circumstances. In the instant case the petitioner was prejudiced and should have been granted the requested instruction.

The reasoning in the *Swenzel* case ignored the fact that, as in the instant case, only part of the law contained in 28 U. S. Code, §632 was charged. The court having charged part of the law, that a defendant has the privilege of testifying if he so elects, it was manifestly unfair to refuse the request to charge containing the balance of the act, that no presumption arises from non-exercise of the privilege.

II.

Variance existed between the indictment and the proof offered, which affected the substantial rights of the petitioner.

Motions to dismiss the indictment (R 273) and to direct a verdict of acquittal (R 322) were made by petitioner on the ground that variance existed between the indictment and the proof offered, which prejudiced petitioner's rights. The indictment (R 7-16) charge eighty-eight defendants with conspiring to violate United States

laws dealing with the importation, and payment of duties and taxes on narcotics. It charged that narcotics were smuggled into the Port of New York aboard transatlantic boats, then taken to a point in Manhattan, in the City and State of New York; that they were then distributed, transported and sold in Manhattan; in Brooklyn, New York, in New Orleans, Louisiana; in several cities in Texas.

The proof failed to reveal a concert of action or common agreement underlying a single conspiracy. The proof supported a charge that numerous persons and groups of persons were engaged in the commission of similar crimes; *i. e.*, violation of the laws relating to narcotics. Each of the several groups acted independently of the others; each transaction among the independent groups was consummated on a cash basis and the exchange of money for drugs was the sole link between such groups.

The Caputo group of smugglers through Ignaro, as middleman, sold narcotics to the Mauro group until the end of 1936, when the Mauro group terminated its existence (R 61, 71-73). The Mauro group resold the narcotics to various individuals (R 48, 49). Mauro had some transactions with one, Cellentano, involving narcotics which the latter brought in from Canada (R 35, 36, 51, 52).

When Ignaro stopped dealing with the Mauro group, he entered into a partnership with Ruppolo, Carrerria and Papa, who purchased drugs from the Caputos and Vencileoni, two unconnected smuggling rings (R 79, 89, 90, 91, 117, 118).

The Ignaro group then resold to various individuals or groups of persons (R 74-78, 80, 81, 82-84, 86, 87). Gentile, one of the purchasers dealing with the Ignaro group, in turn resold narcotics to others in Texas and Louisiana (p. 4, *supra*). The evidence shows a complete lack of concerted action, necessary to support the government theory of a single, widespread conspiracy. Neither of the smuggling groups had any interest in or knowledge of the other. After the smugglers made a sale to the

Ignaro group, they had no interest in any further proceedings. Each sale was a single exchange paid for in cash. The middlemen, the Ignaro group, received no pay from the smugglers for distributing the contraband, nor did they share in the smugglers' receipts. The middlemen made a profit from the turnover, or resale of the contraband.

The same analysis holds true for the relationship between the middlemen and the various groups of retailers. The only transactions between them were the sales of narcotics. The retailers and the middlemen had no interest of any kind in each other, outside the particular sales made. It is important to note that the Mauro group (of which petitioner was allegedly a member) terminated its existence and could obtain no more narcotics in December, 1936 (R 61, 71, 72), whereas the middlemen continued their transactions until the time of their arrest in May, 1937 (R 31, 32). The various groups of retailers in the west were dealing in narcotics until their apprehension in October, 1937 (R 177).

Each of the individuals in a group no doubt was engaged in a conspiracy to violate the law. The evidence showed that the groups in Texas and Louisiana worked together to such an extent that a common purpose could be inferred. However, so far as petitioner is concerned, the evidence showed no more than sales by Ignaro to the Mauro group (of which petitioner was allegedly a member) and sales by the Mauro group to various individuals (R 48, 49, 67-70).

The Supreme Court has held that there can be no conspiracy between a buyer and a seller unless some element is present, other than the sale itself, which does not require the agreement of two persons for its completion *United States* v. *Katz*, 271 U. S. 354, 355 (1925). No such element is revealed by the evidence relating to the Mauro group.

Respondent attempts to distinguish the *Katz* case on the ground that the rule therein applies only to a single

sale by one person to another. This contention ignores the basis of the rule which is that the concert of action necessary as an element of a substantive offense cannot be made the essence of a charge of conspiracy. In *Gebardi* v. *United States*, 287 U. S. 112 (1932), the court, discussing whether or not a man and woman could be charged with conspiracy to violate the Mann Act, stated that where the woman acquiesced in the forbidden transportation, the case fell within those decisions which hold that (p. 122):

> "• • • where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, *Shannon and Nugent* v. *Commonwealth*, 14 Pa. St. 226; *Miles* v. *State*, 58 Ala. 390; cf. *State* v. *Law*, 189 Iowa 910; 179 N. W. 145; see *State, ex rel. Durner* v. *Huegin*, 110 Wis. 189, 243; 85 N. W. 1046, or under the federal statute. See *United States* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *United States*, 34 F. (2d) 839, 841, reversed on other grounds, 281 U. S. 619; *United States* v. *Dietrich*, 126 Fed. 664, 667."

In the instant case the only action of the Mauro group was to purchase narcotics from Ignaro. The concert of action which occurred was only that attendant to a sale. The number of buyers and sellers on each side, or the number of sales do not alter the legal principle that the agreement to make the sale, without more, cannot be made the basis of a conspiracy charge.

The fact that the Mauro group resold the narcotics does not affect the principle. Another substantive offense has been committed but nothing is added to warrant the conclusion that these acts were part of a general continuing conspiracy. Successive sales do not link the successive buyers and sellers into a conspiracy. *United States* v. *Peoni*, 100 Fed. (2d) 401, 403 (C. C. A. 2, 1938):

In the instant case the Mauro group were engaged in a separate conspiracy to deal in narcotics. The evidence revealed numerous other separate conspiracies. It is true that the evidence revealed a common purpose to traffic in narcotics. This should not be confused with, and does not necessarily constitute co-operative action towards a common purpose in which the defendants have a continued interest. The latter circumstances only should give rise to a charge of conspiracy.

Where variance exists between the indictment and proof this court has held that it is material only if it affects the substantial rights of the accused. *Berger* v. *United States*, 295 U. S. 78, 82 (1934). Although this court reversed the Circuit Court (*United States* v. *Berger*, 73 Fed. [2d] 278 [C. C. A. 2, 1934]), it affirmed the lower court on the question of the effect of variance. The Circuit Court stated, p. 280:

> "The materiality of a variance does not depend upon the degree of its logical perversity, but upon how far it throws confusion into the trial and makes it likely to miscarry. Does it surprise the accused by calling upon his to meet a charge for which he is not prepared? Will it allow the production of evidence not competent or material to the crime he has committed, though admissible against another defendant tried at the same time?"

In the instant case, the trial continued for a month. The jury heard seventy-seven witnesses. Eighty-eight defendants were named in the indictment. Fifteen of the defendants had their cases submitted to the jury. These facts are a clear indication of the difficult task presented to the jury in this case.

About seven different conspiracies are indicated in the testimony; the Caputos (R 79), Vencileoni and his assistants (R 89, 90, 91, 117, 118), Ignaro and his group (R 31, 32, 71-73, 103), Mauro, Ross, Marzano and petitioner (R. 48, 61, 71-73), Mauro and Cellentano (R 35,

36, 37, 51, 52), Vaccaro and his group (R 71, 72, 76, 77, 78), Gentile and his groups in Louisiana and Texas (R 86, 93, 149, 150, 155, 158, 159, 166, 167, 184, 185, 190, 191, 192, 210, 211). In addition numerous individuals were named in the indictment and mentioned at the trial who only had isolated transactions with some of the other defendants, unrelated to the conspiracy charged. Such were Di Marzo (R 109); Casesa (R 181-183); Louis King (R 82-84); Visco (R 82-84) and Fitch (R 227, 228).

The jury had to consider numerous transactions, over a period of several years, taking place in several states. A great deal of evidence was introduced of other criminal activities of the other defendants, such as prostitution (R 153, 216, 224), loan shark dealings (R 70, 71, 97, 98), fraud (R 33, 45, 46, 109), and general crookedness [hijacking (R. 89, 90, 101, 102, 128) gambling (R 87, 96, 97) dishonesty (R 88, 183)].

The degree of confusion to which the jury was subjected cannot be estimated. The possibility of error was greatly increased by the nature of the trial. The trial court's submission of the case to the jury on the basis of a single continuing conspiracy was highly prejudicial to petitioner and, under the circumstances, deprived him of a fair consideration of his case.

The evidence against petitioner was not so clear and substantial that it was impossible for a jury to acquit him. The trial court should have granted petitioner's motion to dismiss at the end of the government's case and the motion for a direction of acquittal at the end of the whole case.

III.

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

M. Michael Edelstein,
Counsel for Petitioner.

Samuel B. Wasserman,
on the Brief.